COUNTY OF MONROE
NEW YORK SUPREME COURT

GAY ALLIANCE OF GENESEE VALLEY, INC.

Plaintiff,

vs.

INDEX NO. 8872/91
JUSTICE ANDREW SIRACUSE

CITY ASSESSOR,
CITY OF ROCHESTER, NEW YORK,

Defendant.

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT[1]

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Attorneys for Plaintiff

Dated: October 15, 1992

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[1] As indicated in its pleadings, plaintiff has also moved to amend its Complaint. Plaintiff's Attorney's Affirmation, ¶¶3-7 adequately explains why plaintiff is entitled to amend its Complaint in the manner requested.

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II. FACTS

The Gay Alliance of Genesee Valley, Inc. is a membership organization in Rochester, New York. The GAGV's Certificate of Incorporation reveal that the organization's primary goals include research regarding the potential for gay liberation, the procurement and maintenance of equal rights for lesbians and gay men, the improvement of the quality of life of the general public as well as the lesbian and gay community through education, the acquisition of a community center for everyone who recognizes the need for gay and human liberation, the education of the general public about their civil rights. See Motion Exhibit 1, ¶8; Petition Exhibit A, ¶6.

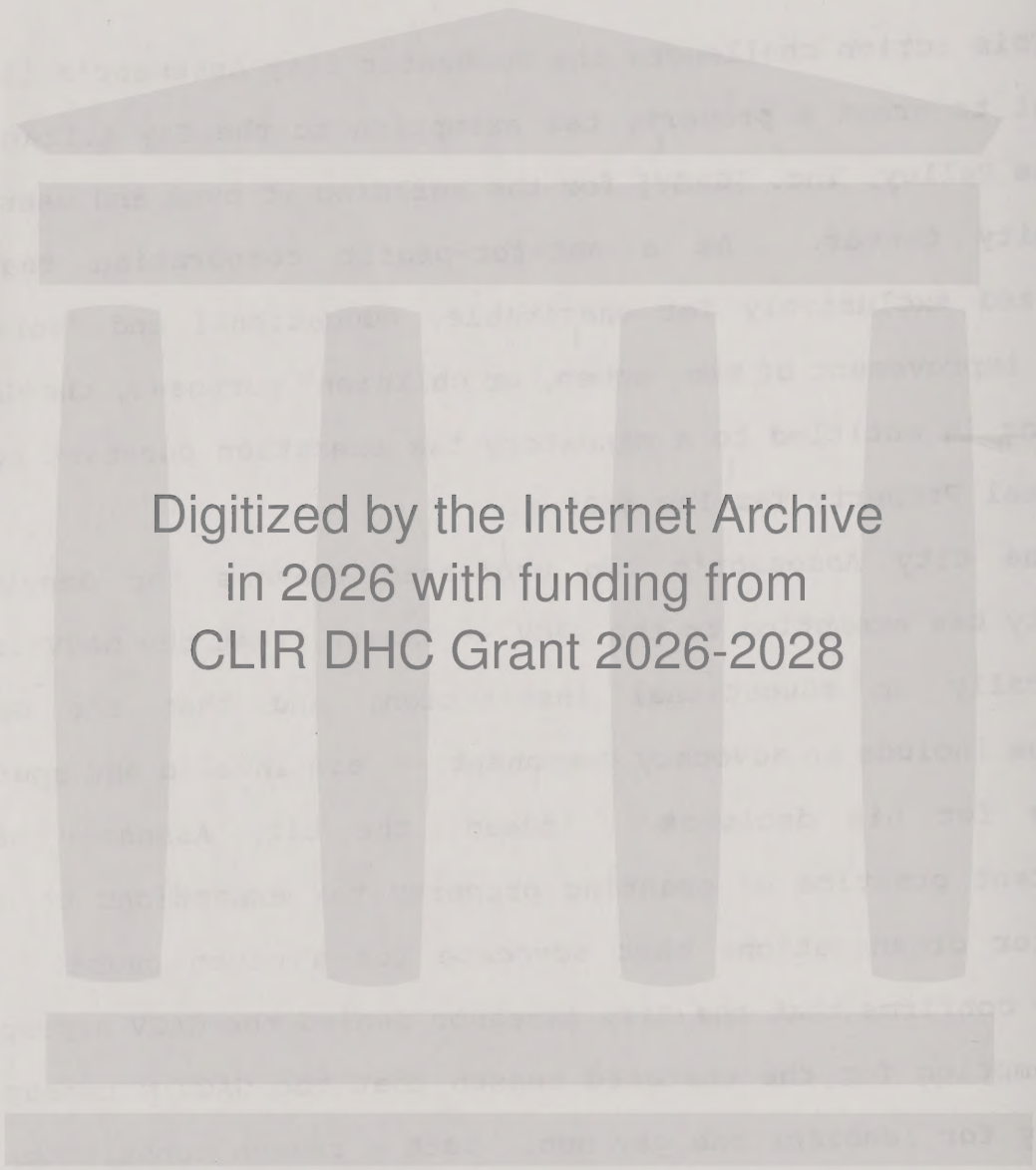
The GAGV's membership is comprised of individuals and interest groups who work in a myriad of ways, on a volunteer basis, to provide cultural, social, counseling and support services to its members, to educate the general public about homosexuality and related issues, and to promote equal rights for lesbians and gay men in the Rochester area community. See Motion Exhibit 1, ¶¶5, 9; Petition Exhibit C, ¶¶5-18. No pecuniary profit inures to the benefit of any of the GAGV's employees, officers, or members. See Motion Exhibit 1, ¶13; Petition Exhibit A, ¶¶3, 5.

In furtherance of its goals, the GAGV's members carry out a wide range of activities. The GAGV publishes a monthly newspaper that is available free of charge to every person in the Rochester area. The GAGV has a Speakers' Bureau that provides public speakers to high schools, colleges, and other organizations in the

I. INTRODUCTION

This action challenges the Rochester City Assessor's illegal refusal to grant a property tax exemption to the Gay Alliance of Genesee Valley, Inc. [GAGV] for the building it owns and uses as a Community Center. As a not-for-profit corporation that is organized exclusively for charitable, educational and "moral or mental improvement of men, women, or children" purposes, the GAGV's building is entitled to a mandatory tax exemption pursuant to New York Real Property Tax Law §420-a.

The City Assessor's two professed reasons for denying a property tax exemption to the GAGV -- namely, that the GAGV is not technically an educational institution, and that the GAGV's purposes include an advocacy component -- are invalid and spurious grounds for his decision. Indeed, the City Assessor has a consistent practice of granting property tax exemptions to other Rochester organizations that advocate for a given cause. This history confirms that the City Assessor denied the GAGV a property tax exemption for the unstated reason that the GAGV's message is equality for lesbians and gay men. Such a reason constitutes the illegal denial of the GAGV's constitutional rights to free speech and to equal protection under law.



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area who wish to learn about homosexuality. The GAGV trains and coordinates "peer facilitators" who respond to "hotline" phone calls. The GAGV coordinates a Gay and Lesbian Youth Group that meets regularly. Recently, the GAGV worked closely with the Rochester City Police to develop a sensitivity training for individuals convicted of assaulting gay men in Rochester. The GAGV coordinates regular social gatherings of its membership, and sponsors an annual picnic and auction. In addition, the GAGV acts as an umbrella organization for a number of lesbian and gay-related community groups, such as several literary groups, the Lesbian Resource Center, the bowling group, the Men's Group, and Queer Nation, whose goals and purposes are consistent with those of the GAGV. See Motion Exhibit 1, ¶9; Petition Exhibits C, D, G.

Given its purposes, structure, and activities, the GAGV was incorporated as a not-for-profit corporation pursuant to Section 216 of the New York Education Law and Section 404(d) of the New York Not-for-Profit Law on December 14, 1973. See Motion Exhibit 1, ¶¶2, 6; Petition Exhibit A. The GAGV was granted federal tax exempt status as a charitable, educational, or religious organization pursuant to Section 501(c)(3) of the US Internal Revenue Code some years later, on November 19, 1981. See Motion Exhibit 1, ¶7; Petition Exhibit B.

In March 1990, seventeen years after its incorporation, the GAGV realized a dream. It purchased the building located at 179-183 Atlantic Avenue in Rochester, New York to use as a Community Center and home base for its activities. See Motion Exhibit 1,

¶10. Every activity that the GAGV performs in and out of the Center is related to the furtherance of its purposes and goals. See Motion Exhibit 1, ¶11; Petition Exhibit C, ¶¶21-22. The GAGV performs no commercial function, nor is any commercial function performed out of the Center. See Motion Exhibit 1, ¶12; Petition Exhibit C, ¶19.

On January 28, 1991, the Gay Alliance of Genesee Valley, Inc. submitted an application to the Rochester City Assessor for a mandatory property tax exemption for its Community Center. See Motion Exhibit 1, ¶14; Petition Exhibit D. In a letter dated March 8, 1991, the Deputy City Assessor advised the GAGV that its application was denied because the GAGV "is not an educational organization." See Motion Exhibit 1, ¶15; Petition Exhibit E.

The GAGV filed an administrative appeal Complaint with the Rochester Board of Assessment Review to challenge the City Assessor's decision. See Motion Exhibit 1, ¶16; Petition Exhibit F. The GAGV contended that it has a combination of educational, charitable, and "moral or mental improvement of men, women or children" purposes and functions that entitle it to a property tax exemption. See Petition Exhibit F (Letter dated March 22, 1991). To support its assertion, the GAGV offered both the sworn testimony of its President as well as substantial documentary evidence. See Motion Exhibit 1, ¶¶17, 18; Petition Exhibits A, B, C, F, G. Accordingly, the GAGV maintained, it is entitled to a mandatory property tax exemption under Real Property Tax Law §420-a as

interpreted by the courts of New York State. See Petition Exhibits C, F.

On or about April 30, 1991, the GAGV received a confusing Notice from the Board of Assessment Review. See Motion Exhibit 1, ¶19; Petition Exhibit H. The undated Notice stated that under NY Real Property Tax Law §525, the Board had denied the GAGV's request for an increase in its property assessment from $50,000 to $72,000. See Petition Exhibit H. Because the GAGV had never made such a request, the GAGV believed that the Notice was simply a mistake, and continued to wait for a Notice regarding its administrative appeal for a property tax exemption under NY Real Property Tax Law §420-a. See Motion Exhibit 1, ¶22. However, no corrective Notice arrived.

On August 21, 1991, the GAGV's attorney called the Board of Assessment Review to find out what had happened to the GAGV's administrative appeal Complaint. See Plaintiff's Attorney's Affirmation, ¶59; Motion Exhibit 1, ¶23. The Municipal Attorney who had represented the City Assessor at the March 26th hearing informed the GAGV's lawyer that the previous Notice was sent in error, and that a correct Notice would be sent. See Plaintiff's Attorney's Affirmation, ¶60; Motion Exhibit 1, ¶24. However, in a letter dated August 22, 1991, the Municipal Attorney informed the GAGV's attorney that she believed the incorrect Notice sufficiently notified the GAGV that its appeal for a property tax exemption under NY Real Property Tax Law §420-a was denied. See Motion Exhibit 11. The Municipal Attorney's belief notwithstanding, the

Board of Assessment Review has not, to date, sent the GAGV its decision on the GAGV's administrative appeal from the denial of its application for a mandatory property tax exemption under Real Property Tax Law §420-a. See Plaintiff's Attorney's Affirmation, ¶63.

Given the manifest futility of any administrative action, the GAGV filed a Petition for Relief pursuant to Article 78 of the CPLR to reverse the apparent affirmance of the City Assessor's denial of a property tax exemption for the building owned by the GAGV. See Motion Exhibit 1 and Petition Exhibits A to I. After lengthy negotiations, attorneys for the parties stipulated to the conversion of this action to a declaratory judgment action against the City Assessor.[1] See Plaintiff's Attorney's Affirmation, ¶66; Motion Exhibit 12. On November 13, 1991, the City Assessor filed his Verified Answer to the GAGV's Complaint. See Motion Exhibit 13. The GAGV now moves for summary judgment on its claims.[2]

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[1] Despite the Stipulation, it is clear that plaintiff's claims can be raised in the context of either an Article 78 proceeding or a declaratory judgment action. See Kahal Bnei v. Fallsburg, 78 NY2d 194 (1991). The Stipulation expressly provides that the court may convert this action back to an Article 78 action if deemed necessary for relief or for any other purpose. See Motion Exhibit 12, ¶6; CPLR §103.

[2] As indicated in plaintiff's pleadings, plaintiff also moves to amend its Complaint to: (1) allege defendant's denial of the GAGV's rights to free speech and freedom of association under the federal and state constitutions; (2) assert that the GAGV's federal constitutional claims are made actionable by 42 U.S.C. §1983; and (3) request reasonable attorney's fees under 42 U.S.C. §1988. This court should grant plaintiff's Motion to Amend its Complaint for the reasons that are sufficiently outlined in Plaintiff's Attorney's Affirmation, ¶¶3-7.

III. AS A NOT FOR PROFIT CORPORATION ORGANIZED FOR CHARITABLE, EDUCATIONAL AND "MORAL OR MENTAL IMPROVEMENT OF MEN, WOMEN OR CHILDREN" PURPOSES, THE GAY ALLIANCE OF GENESEE VALLEY IS ENTITLED TO A MANDATORY PROPERTY TAX EXEMPTION FOR ITS BUILDING THAT IT USES AS A COMMUNITY CENTER.

Under NY Real Property Tax Law §420-a, real property owned by a corporation that is:

> organized or conducted exclusively for ... charitable, ... educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes ....

is entitled to a property tax exemption, so long as no "officer, member or employee ... receive[s] any pecuniary profit from the operations thereof ... ." NY Real Property Tax Law §§420-a(1)(a), (b). This exemption is not discretionary privilege; rather, it is a constitutional and statutory right for any corporation and its property that meet the provision's prerequisites. See NY Constitution, Article 16, §1.

The Gay Alliance of Genesee Valley, Inc., and the Community Center it owns, fully satisfy the three criteria for a mandatory tax exemption under NY Real Property Tax Law §420-a. Addressing the latter two conditions first, the sworn statements and documentary evidence in the record plainly demonstrate: (1) that the GAGV's building is used exclusively to further its purposes and goals; and (2) that no pecuniary profit inures to the benefit of any of the GAGV's employees, officers, or members. See Motion Exhibit 1, ¶¶9, 11, 12, 13; Petition Exhibits A, ¶¶3, 5; C, D, F, G. Defendant City Assessor does not dispute the GAGV's satisfaction

of these two prerequisites for a property tax exemption.[3] Further discussion of the GAGV's compliance with these two requirements is therefore unnecessary.

That the GAGV is "organized or conducted exclusively for ... charitable, ... educational, or moral or mental improvement of men, women or children purposes, or for two or more such purposes," NY Real Property Tax Law §420-a, is similarly clear from the evidence in the record. The exclusive purposes of the GAGV are research about homosexuality, education of society about homosexuality and civil rights in general, the betterment of society through education, the provision of a "place for community" for gays and lesbians, and advocacy for equal rights in this society for lesbians and gay men. Motion Exhibit 1, ¶8; Petition Exhibits A, ¶6; C, D.

To further its purposes, the GAGV conducts a wide variety of activities, ranging from the publication and city-wide distribution of a free monthly newspaper, the provision of speakers about homosexuality to schools, universities, and organizations throughout the area, and peer facilitators, to a Gay and Lesbian Youth Group, social gatherings, and coordination and assistance to the Rochester City Police Department. The GAGV also acts as a "home base" for other volunteer organizations who have, as their

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[3] In his Answer, the City Assessor states that he "lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs ... 11, 12 [and] 13 of the complaint." Motion Exhibit 13, ¶3. Inasmuch as the GAGV asserted these facts in a Verified Complaint, and again in an Attorney's Affirmation, the must be accepted as true unless disputed with supporting evidence.

common link, purposes consistent with those of the GAGV. See Motion Exhibit 1, ¶9; Petition Exhibit C.

That these purposes and activities qualify an organization such as the GAGV for a property tax exemption under Real Property Tax Law §420-a is evident from the application of the statute to the Lesbian and Gay Community Services Center Inc. [LGCSC] in New York City. The LGCSC is an organization that is nearly identical to the GAGV in its purposes and activities, although it operates on a much larger scale. Yet unlike defendant, the New York City Assessor had no difficulty comprehending that the LGCSC is entitled to a property tax exemption for its Community Center under Real Property Tax Law §420-a. See Motion Exhibits 7, ¶11; 9.

Similar to the GAGV, LGCSC is a not-for-profit organization committed to providing a safe space for the gay and lesbian community of New York City to gather, organize, socialize, and find the vital health services geared specifically toward the community. See Motion Exhibits 7, 8. Like the GAGV, the LGCSC provides cultural programs to the community. Like the GAGV, the LGCSC offers social and cultural events, such as dances, concerts, and movies on a regular basis. The LGCSC, like the GAGV, acts as home base for more than 250 advocacy, civic, social, educational and cultural groups that have, as their common link, the goal of serving the gay and lesbian community throughout New York City. See Motion Exhibit 7.

Defendant insists nonetheless that the GAGV does not qualify for a mandatory tax exemption under Real Property Tax Law §420-a.

He initially argued that the GAGV was not entitled to a property tax exemption because it "does not offer a formal instructional program," and therefore is not an educational organization. See Petition Exhibit E. The GAGV concedes that it is not strictly an "educational" institution in that it is neither certified as such by the Commissioner of Education nor chartered by the New York Board of Regents, and it does not have a faculty or student enrollment. Nevertheless, like the LGCSC, the GAGV's purposes and its various functions encompass a combination of exclusively educational, charitable, and "moral or mental improvement of men, women or children" purposes, thereby entitling it to a mandatory property tax exemption under Real Property Tax Law §420-a.

In Symphony Space, Inc. v. Tishelman, 60 NY2d 33 (1983), the New York City Assessor, like defendant in this action, had denied tax exempt status to a theater owned by Symphony Space, a not-for-profit corporation organized to engage in various musical, theatrical, artistic and academic activities. Like the GAGV, Symphony Space was not certified by the Commissioner of Education, was not chartered by the Board of Regents, and did not have a faculty or student enrollment.

Like defendant in this action, the New York City Assessor had argued that Symphony Space, Inc. was not strictly an educational institution, and therefore was not entitled to a property tax exemption. The New York City Assessor had also argued that Symphony Space was not entitled to a property tax exemption under the "moral or mental improvement" clause because, according to the

lower courts, that exemption was available only to "YMCA types of organizations." 60 NY2d at 37.

The New York Court of Appeals expressly and categorically rejected these restrictive interpretations of both the "educational" and "moral or mental improvement" criteria. Writing for a unanimous bench, Chief Judge Wachtler emphasized:

> [T]his court has not made such requirements necessary before an institution qualifies for a tax exemption under those categories (Matter of North Manursing Wildlife Sanctuary [City of Rye, 48 NY2d 135, supra; see Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 NY2d 476, supra). In fact, rather than dissecting each exempt purpose, this court has indicated that the statute may encompass property used primarily for various and varied charitable and educational purposes and the moral or mental improvement of the citizenry (Mohonk Trust v. Board of Assessors of Town of Gardiner, supra, at p. 484).

60 NY2d at 37.[4] The Court went on to hold that Symphony Space was entitled to a property tax exemption under Real Property Tax Law §420-a, not as an exclusively "educational" organization, but as an organization whose purposes and activities "fall within the general categories of 'charitable, educational and the moral and mental improvement' under section 420-a." Symphony Space, 60 NY2d at 36.

Like Symphony Space and the LGCSC, the GAGV is organized, and its Community Center is used, exclusively for a combination of

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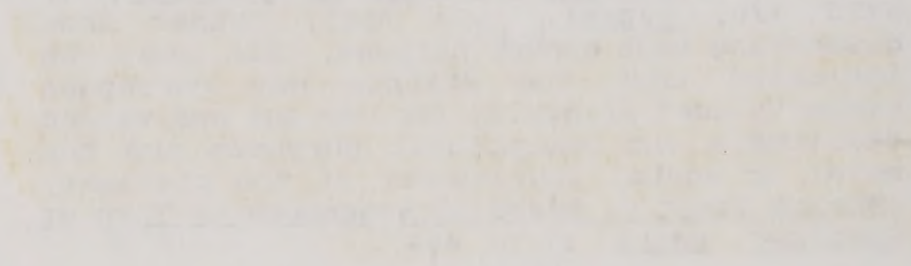
[4] The Court earlier noted that "decisions of ... the lower courts give the terms 'charitable, educational and moral or mental improvement' an overly narrow interpretation in light of recent decision by this court (see Matter of New York Botanical Garden v Assessors of Town of Washington, 55 NY2d 328; Matter of North Manursing Wildlife Sanctuary [City of Rye], 48 NY2d 135, Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 NY2d 476)." 60 NY2d at 36.



"various and varied charitable and educational purposes and the moral or mental improvement of the citizenry."[5] The GAGV provides charitable support and counseling services through its peer facilitators, its hotline, and its Gay and Lesbian Youth Group. The GAGV educates the general public about homosexuality, homophobia, the rights of lesbians and gay men, AIDS, and related issues through its newspaper and its Speakers' Bureau. The GAGV acts "for the moral or mental improvement of men, women or children" throughout the Rochester community by educating the public, speaking out, providing direct counseling and support services, and working within the community to eradicate both the myths about lesbians and gay men and the barriers to their equal treatment in society.

Like the LGCSC and Symphony Space, the GAGV "is not organized for the purpose of making a profit" or for any commercial enterprise. 60 NY2d at 39. Like the LGCSC and Symphony Space, the GAGV "provides the general public with access to all of its functions and activities. 60 NY2d at 39. Like the LGCSC and Symphony Space, the GAGV Community Center is:

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[5] The GAGV asserts that its purposes and activities are exclusively educational, charitable, and/or "moral or mental improvement" in character. The existence of some aspects of the GAGV's purposes and activities that are not exclusively educational, charitable, and/or "moral or mental improvement," however, would not defeat its entitlement to a mandatory property exemption. For purposes of the statute, the word "exclusively" connotes "primarily" or "principally." See Symphony Space, 60 NY2d at 38; Mohonk Trust v. Board of Assessors of Town of Gardiner, 47 NY2d 476, 483 (1979).

> used for the purpose of exploring these various aspects [of the relationship to and role of lesbians and gay men in society], [and] is as necessary to the public good and is as open to and enjoyed by the public as is property used for environmental and conservation purposes.

60 NY2d at 39. In sum, the purposes and activities of the GAGV, like those of LGCSC and Symphony Space, fully comport with the prerequisites for a mandatory property tax exemption under Real Property Tax Law §420-a.[6]

Confronted with the Symphony Space decision, the Municipal Attorney changed gears with the Board of Assessment Review. She argued that the GAGV was not entitled to a property tax exemption because its purposes and activities promote a "specific point of view": in this case, the equal treatment of lesbians and gay men in society. See Motion Exhibit 10, p.2.

The GAGV does not deny that it espouses the elimination of discrimination against lesbians and gay men. Nevertheless, the GAGV's advocacy attribute does not defeat its entitlement to tax exemption.

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[6] Swedenborg Foundation, Inc. v. Lewisohn, 40 NY2d 87 (1987), cited by defendant's attorney to the Board of Assessment Review, is inapposite. The primary purpose of the Swedenborg Foundation was "to disseminate the writings and views of Emanuel Swedenborg." 40 NY2d at 95. Written seven years before Symphony Space, the Swedenborg decision that the Foundation's primary purpose was not educational because it was not affiliated with any recognized educational institution, its activities did not form a major part of an organized instructional program, it was not chartered by the Board of Regents, and it was not classified as an educational institution by the Department of Education. See 40 NY2d at 95. As discussed in the text, the Symphony Space Court explicitly rejected these factors as essential elements of an "educational" organization for property tax exemption purposes. See 60 NY2d at 37.

Once again, in deciding the Symphony Space case, the Court of Appeals addressed and discarded an analogous argument. The trial court had concluded that the performing arts were not encompassed by the general category of charitable, educational, or mental and moral improvement purposes necessary for tax exemption. The Court repudiated this analysis, holding instead that:

> There is nothing in the statute which would indicate that property used for performing arts is excluded from an absolute tax exemption **if it otherwise qualifies under the general categories** of subdivision 1 of section 420-a of the Real Property Tax Law (case omitted).

60 NY2d at 38 (emphasis added).

Similarly, there is nothing in the statute that would indicate that an organization that advocates a particular point of view is barred from a property tax exemption if it otherwise qualifies under the general category of having primarily one or more charitable, educational, or "moral or mental improvement of men, women or children" purposes. To be more precise, there is nothing in the statute that precludes the GAGV, which otherwise qualifies for a property tax exemption because it has a combination of charitable, educational, and "moral or mental improvement of men, women or children" purposes, from obtaining a property tax exemption simply because one of its purposes is to promote the eradication of discrimination against lesbians and gay men. And,

despite her attempt to persuade the court otherwise, no reported decisions support defendant's attorney's position.[7]

Like Symphony Space and like the LGCSC, the GAGV meets the prerequisites for a property tax exemption pursuant to Real Property Tax Law §420-a. Accordingly, defendant's action should be reversed by this court.

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[7] Defendant's attorney has characterized the GAGV as "primarily an advocacy or lobbying organization." See Motion Exhibit 10, p. 2. This characterization is false and misleading. The evidence in the record reveals that the promotion of the eradication of discrimination against the lesbian and gay community is only one of several purposes of the GAGV, and that the vast majority of the GAGV's activities further its other stated goals.

Under these circumstances, even if an organization's advocacy purpose is not encompassed by the statute's charitable, educational, or "moral or mental improvement" criteria, the GAGV's advocacy purpose does not bar the GAGV from its entitlement to a property tax exemption. In Mohonk Trust v. Assessors, 47 NY2d 476 (1979), the organization's primary purposes were self-described as "charitable, religious, scientific, literary or educational." 47 NY2d at 479. In addition, the organization had, among others, the stated purposes of contributing to the public welfare, advancing scientific and cultural arts, reviving the fundamental values in life, and promoting the integration of spiritual values with physical and mental activities. 47 NY2d at 479-80.

The Court of Appeals held that despite Mohonk Trust's explicit non-exempt purposes (e.g., the scientific and literary purposes), Mohonk Trust's activities revealed that its primary purpose was the use of the land for "environmental, conservation, educational and compatible recreational purposes." 47 NY2d 476. Thus, regardless of its other purposes, Mohonk Trust's non-exempt purposes did not bar a property tax exemption. 47 NY2d at 484.

Like Mohonk Trust, the overwhelmingly majority of the GAGV's functions and activities advance educational and charitable purposes unrelated to its advocacy purpose. Accordingly, like Mohonk Trust, the GAGV is entitled to a property tax exemption.

IV. BY DENYING A PROPERTY TAX EXEMPTION TO AN ORGANIZATION THAT PROMOTES THE ELIMINATION OF DISCRIMINATION AGAINST LESBIANS AND GAY MEN WHILE GRANTING PROPERTY TAX EXEMPTIONS TO ORGANIZATIONS THAT ADVOCATE OTHER CAUSES, THE CITY ASSESSOR VIOLATED THE GAGV'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREEDOM OF SPEECH, ASSOCIATION AND EQUAL PROTECTION UNDER LAW.

> Above all else, the First Amendment [to the United States Constitution] means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

Police Department of City of Chicago v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290 (1972). The free speech guarantee of the New York Constitution, found at Article I, §8, is even more expansive than the minimum protections afforded by the federal constitution. See Immuno AG. v. J. Moor-Jankowski, 77 NY2d 235, 249 (1991). Similarly, the related free association protections of the First Amendment to the United States Constitution and Article 1, §9 of the New York State Constitution mean that a government cannot restrict a group's right to associate based on its philosophy. Citizens Against Rent Control v City of Berkeley, 454 U.S. 293, 295, 102 S.Ct. 434, 437 (1981); NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163 (1958). Finally, the equal protection clauses of the federal and New York State Constitutions, in conjunction with their respective free speech clauses, forbid a governmental entity from permitting the expression of some views but not others. Police Department of City of Chicago v. Mosley, 408 U.S. at 96, 92 S.Ct. at 2290. Examining defendant's refusal to grant a property tax exemption to the GAGV with these fundamental precepts in mind,

it is clear that defendant's actions are constitutionally indefensible.

As discussed above, defendant's attorney maintains that the GAGV is not entitled to a property tax exemption because it has an advocacy focus as one of its purposes. However, given defendant's conduct with respect to similar organizations, this argument is disingenuous at best.

The record in this action graphically discloses that defendant has time and again granted a mandatory property tax exemption to other organizations that include advocacy for a particular point of view and/or on behalf of a particular constituency among their primary purposes. Four examples will suffice.

Group 14621 Community Association, Inc. owns a building located at 1171 N. Clinton Avenue in Rochester, for which defendant has granted a mandatory property tax exemption. See Motion Exhibits 1, ¶34, and 2, p. 2. Among its stated purposes, Group 14621 Community Association is organized:

> To further the interest of the inhabitants and residents of the City of Rochester and County of Monroe located in the geographical area encompassed by the boundaries of the United States Postal Service zip code area 14621.

Motion Exhibit 3. If the advocacy component of Group 14621 is vaguely expressed in this provision, it is clearly articulated in another:

> To promote and encourage laws for the protection of the inhabitants of the area.

Motion Exhibit 3.

Court papers filed in State Supreme Court by Group 14621

Community Association in May 1990 expressed its advocacy purpose and function in even more forceful terms:

> The purpose for which [Group 14621] is organized is to promote social welfare by lessening the burdens of government, providing relief to the poor, distressed or underprivileged and promote social welfare thereby as well as through lessening neighborhood tension, eliminating prejudice and discrimination, defending human and civil rights, and combating community deterioration.

Petition Exhibit I, p. 2.

Similarly, defendant has granted a mandatory property tax exemption to the Regional Council on Aging, Inc. [RCOA] for the building it owns at 79 N. Clinton Avenue in Rochester. See Motion Exhibit 2, p. 6. The RCOA's advocacy component is far from ambiguous. Article II of the RCOA's By-Laws states unequivocally:

> The mission of the Regional Council on Aging shall encompass both direct service and advocacy. ...
>
> Advocacy is another priority for this agency and shall be pursued by board and staff, while maintaining as an ideal that seniors advocating on their own behalf is the most effective form of senior advocacy.
>
> As areas (geographical and/or issue) develop where needs of seniors are not being adequately met we shall be prepared to adjust in a responsive manner.

Motion Exhibit 4, p 1.

Likewise, defendant has granted a mandatory property tax exemption to the 19th Ward Community Association of Rochester, New York, Inc. for its building located at 504-520 in Rochester. See Motion Exhibit 2, p. 14. Although the Association's By-Laws do not use the word "advocacy" to describe its purposes, the advocacy

nature of some of its purposes is patently inherent in their focus:

> 1) to create a conscious multi-racial community where individual and cultural differences are not only tolerated but celebrated, and where people share a sense of community;
>
> 2) to insure that the community, through the Association, determines and receives the kinds of high quality services it needs from public and private institutions;
>
> 3) to encourage resident home ownership and oppose any threat to the residential character of the community.

Motion Exhibit 5, p. 1. These three stated purposes necessarily entail advocacy for its viewpoint that a racially and culturally diverse community is beneficial, advocacy to obtain "services it needs from public and private institutions," and advocacy "to encourage resident home ownership and [to] oppose any threat to the residential character of the community."

Finally, the Young Women's Christian Association of Rochester and Monroe County, New York, Inc. [YWCA] also underscores defendant's historical practice of granting property tax exemptions to organizations with an advocacy purpose. Defendant has granted a mandatory property tax exemption to the YWCA with respect to the building it owns at 175 N. Clinton Avenue in Rochester. The YWCA's By-Laws include the following unambiguous purpose:

> OUR ONE IMPERATIVE:
>
> The Association affirms the One Imperative, "to thrust our collective power toward the elimination of racism wherever it exists and by any means necessary."

Motion Exhibit 6, p. 1. Defendant would be hard pressed to

characterize this purpose as less advocacy-oriented than any of the GAGV's purposes. Nevertheless, defendant granted a property tax exemption to the YWCA but denied one to the GAGV, ostensibly because of its advocacy component.[8]

These examples, representing a variety of organizations with a variety of purposes and activities, are not simply arbitrary "mistakes" made by defendant in granting property tax exemptions. Rather, they represent a consistent practice of granting property tax exemptions to organizations that, like the GAGV, are organized for educational, charitable, and "moral or mental improvement" purposes regardless of their advocacy component.

Defendant's history of granting mandatory property tax exemptions to other organizations with an advocacy component is instructive in two regards. First, it demonstrates the flagrant contradiction between his articulated explanation for denying a property tax exemption to the GAGV and his actual practice of granting, not denying, property tax exemptions to organizations that have advocacy-related focuses.

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[8] It is noteworthy that even prior to the Symphony Space decision, courts that strictly construed the enumerated purposes listed in Real Property Tax Law §420-a held that the "mental or moral improvement" clause was meant to apply to "organizations such as the ... **YWCA**. ..." Presbyterian Residence Center Corporation v. Wagner, 66 AD2d 998, 411 NYS2d 765 (4th Dep't 1978)(emphasis added). Inasmuch as the YWCA's "One Imperative" has an undeniable advocacy focus, it is clear that the property tax exemption statute does not exclude organizations, such as the YWCA, that have an advocacy component. Symphony Space, of course, expressly rejected this narrow reading of the "mental or moral improvement" clause. See discussion above.

Second, it reveals that defendant's ostensible excuse for denying a property tax exemption to the GAGV, namely, the GAGV's advocacy component, is bogus. Though unstated, the actual reason defendant denied the GAGV a property tax exemption is conspicuously obvious. The only relevant difference between the GAGV and other organizations with advocacy-related purposes, to which defendant has granted property tax exemptions, is that the GAGV's membership is predominantly homosexual, and its perspective is gay and lesbian rights, while the perspectives of the other organizations are perhaps less controversial. Such a discriminatory application of the property exemption law, based as it is on the GAGV's membership and the subject matter of its viewpoint, violates the GAGV's constitutional rights.[9]

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[9] Defendant will undoubtedly deny that he discriminated against the GAGV because of its positive gay and lesbian rights message. Illegal discriminatory intent is, however, rarely admitted or provable by direct evidence. For this reason, courts have ruled that circumstantial evidence, such as a demonstrable departure from normal patterns, is sufficient to prove unconstitutional discrimination. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 267-68 (1977); Santiago v. Miles, 774 F.Supp. 775, 797 (W.D.N.Y. 1991). Further, for purposes of equal protection analysis:

> Discrimination need not be the sole purpose for the action. It is enough if plaintiffs show that a discriminatory purpose was a "motivating factor" in the administrative decision. See Arlington Heights, 429 U.S. at 265, 97 S.Ct. at 563; Hunter v. Underwood, 471 U.S. 222, 225, 105 S.Ct. 1916, 1918 (1985).

Santiago v. Miles, 774 F.Supp. at 797. Defendant's discriminatory intent and conduct are amply demonstrated by its attempt to justify its decision to disqualify the GAGV from a property tax exemption for a reason that is not only illegitimate, but also did not qualify similar organizations.

Simply put, defendant cannot, consistent with the interrelated constitutional guarantees of free speech, freedom of association, and equal protection, apply the property tax exemption statute in a manner that grants property tax exemptions to organizations whose membership and point of view he endorses, but denies property tax exemptions to organizations whose membership and points of view he dislikes. See Carey v. Brown, 447 U.S. 455, 460-63, 100 S.Ct. 2286, 2290-91 (1980); Police Department of Chicago v. Mosley, 408 U.S. at 99-102, 92 S.Ct. at 2292-93. Having granted property tax exemptions to organizations that advocate for specified issues, such as the rights of senior citizens, the eradication of racism, the creation of a culturally diverse society, and the promotion of civil rights, defendant cannot now refuse to grant a property tax exemption to the GAGV because it includes advocacy for lesbian and gay rights among its purposes. See Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983); Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972); Gay Students Organization of University of New Hampshire v. Bonner, 509 F.2d 652, 658-62 (1st Cir. 1974); Penthouse International, Ltd v. Koch, 599 F.Supp. 1338 (S.D.N.Y. 1984); Planned Parenthood Association/Chicago Area v. Chicago Transit Authority, 592 F.Supp. 544, 552 (N.D. Ill. 1984); Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transportation Authority, 584 F.Supp. 985, 989 (W.D.N.Y. 1984); North Shore Right to Life v. Manhasset American Legion Post No. 304, Town of North Hempstead, 452 F.Supp. 834, 838-39 (E.D.N.Y. 1978); Toward a Gayer

Bicentennial Committee v. Rhode Island Bicentennial Commission, 417 F.Supp. 632, 637 n.6, 641-42 (D.R.I. 1976).

That defendant discriminated against the GAGV due to the subject matter of its ideas when it denied the GAGV a property tax exemption is plain not merely by the obvious inferences. See discussion above and n.9. His discriminatory intent is also evident from his attorney's letter to the Board of Assessment Review. Explaining defendant's decision, his attorney wrote that the information provided by the GAGV in its educational activities was not "a neutral and disinterested offering of knowledge for its own sake." Instead, according to defendant's attorney, the information encompasses "a desire to cause social change." Motion Exhibit 12, p. 2. This attempt to distinguish between the kinds of speech that defendant would approve cannot be tolerated under the constitutional guarantees to free speech.

In North Shore Right to Life Committee v. Manhasset American Legion Post No. 304, Town of North Hempstead, 452 F.Supp. 834 (E.D.N.Y. 1978), for example, the parade organizers attempted to bar an anti-abortion group from marching in the Memorial Day Parade. The organizers justified their decision on the ground that permitting the group's participation would violate the organizers' ban against "non-political" participants. 452 F.Supp. at 836. The court ruled that having permitted participation by groups with less controversial "political" views, such as the Girl Scouts, and even the firefighters, the organizers could not ban another group under the guise of its "political" viewpoint. 452 F.Supp. at 840.

In a similar vein, the Niagara Frontier Transportation Authority was not permitted to ban a pro-choice public service announcement from the buses in Buffalo, New York on the ground that the message was "controversial" where other arguably less controversial messages had been permitted in the past. Coalition for Abortion Rights and Against Sterilization Abuse v. Niagara Frontier Transportation Authority, 584 F.Supp. 985, 989 (W.D.N.Y. 1984). Likewise, having permitted speakers on other subjects to use its facilities, Lawrence University could not ban Angela Davis from speaking on the ground that its rules permitted only "non-partisan" and "nondenominational" speakers. The court observed that the distinctions drawn by such a rule had the constitutionally impermissible effect of regulating speech on the basis of content. See also Carey v. Brown, 447 U.S. 455, 460-63, 100 S.Ct. 2286, 2290-91 (1980); Police Department of Chicago v. Mosley, 408 U.S. at 99-102, 92 S.Ct. at 2292-93.

Like the NFTA and like Lawrence University, having granted property tax exemptions to other organizations that espouse certain points of view, defendant cannot deny the GAGV's request for a property tax exemption on the ground that the information it conveys is geared towards "social change." Such a distinction is impermissibly content-based, and therefore an abridgment of the GAGV's constitutional right to free speech.

The equal protection implications of defendant's actions are also apparent from a case remarkably similar to this action that was decided nearly twenty years ago. In Matter of Thom, 33 NY2d

609 (1973), the Appellate Division had denied corporate status to Lambda Legal Defense & Education Fund, Inc., an organization committed to the legal representation of lesbians and gay men on issues relating to their homosexuality. The Appellate Division denied the application ostensibly because Lambda was not benevolent or charitable in purpose. The Court of Appeals reversed the denial in a per curiam decision because the Appellate Division's conclusion was "unsupportable." 33 NY2d at 609. The concurring opinion observed that the purposes and functions of Lambda were nearly identical to those of the Puerto Rican Legal Defense and Education Fund, Inc., whose corporate status the Appellate Division had previously approved. Under these circumstances, the Appellate Division's explanation for its Lambda decision was inconsistent with its practice, and therefore violated Lambda's right to equal protection under law. 33 NY2d at 612-16.

In a more contemporary case, the Appellate Division, First Department recently reaffirmed the fundamental constitutional principles at stake in this case in Matter of Frankel v. Roberts, 165 AD2d 382 (1st Dep't 1991). In Frankel, Justice George Roberts, of criminal court in New York County, ordered two public defenders out of his courtroom because they were wearing political buttons stating, "Ready to Strike." Justice Roberts told the public defenders that he would not object to "Save the Whales" buttons, but that the "Ready to Strike" buttons were "unsettling." 165 AD2d at 385. In granting the public defenders' request for an injunction, the court emphasized that under the Equal Protection

Clause and First Amendment to the United States Constitution, the judge could not grant the use of a forum to people whose views he found acceptable, but deny use to those wishing to express more controversial views. 165 AD2d at 385-86.

Like Justice Roberts, who would allow lawyers to wear buttons advocating for the protection of whales, defendant has granted property tax exemptions to organizations that advocate for the elderly rights, civil rights, and the eradication of racism. Like Justice Roberts, who barred lawyers wearing buttons advocating an attorney strike, defendant denied a property tax exemption to an organization that advocates for the rights of lesbian and gay men. Like Justice Roberts' actions, defendant's refusal to grant a property tax exemption to the GAGV violates the GAGV's interconnected constitutional rights to free speech, freedom of association, and equal protection under law.

V. THE GAGV'S FAILURE TO CHECK THE "CHARITABLE" BOX AND THE "MENTAL AND MORAL IMPROVEMENT" BOX ON ITS PROPERTY TAX EXEMPTION FORM DOES NOT DISQUALIFY THE GAGV FROM A PROPERTY TAX EXEMPTION.

In his Answer, defendant argues the GAGV is not entitled to a property tax exemption as an organization that is organized for a combination of educational, charitable, and "moral and mental improvement of men, women and children" purposes because the GAGV checked only the "educational" box on its application. This affirmative defense is meritless for several reasons.

First, while the GAGV concedes it should have checked the "charitable" and "moral or mental improvement of men, women, or

children" boxes in addition to the "educational" box in response to Part "a" of Question 2 on its application, the other information provided in response to Parts "b" and "c" of Question 2 reveal that the GAGV's purposes fall well within a combination of all three purposes. In addition, Part "b" of Question 2 asks the applicant to state the organization's primary purpose if there is more than one purpose. The GAGV answered this question, thereby indicating that although it checked only one box in Part "a" of Question 2, the GAGV has more than one exempt purpose. If defendant was concerned that the single box that the GAGV checked was somehow inconsistent with the written information in the application, he was not precluded from calling the GAGV to clarify the matter. Surely, defendant is not suggesting that the checked-off boxes in Part "a" of Question 2 of an organization's application control defendant's interpretation of an organization's purposes regardless of the written information in Parts "b" and "c" of Question 2.

Second, in its administrative appeal, the GAGV expressly maintained that it has a combination of educational, charitable, and "moral or mental improvement" exempt purposes. Nevertheless, defendant asserts, without statutory, regulatory or case law support, that when the GAGV did so, "it was already too late." Answer, ¶8. Defendant is wrong. The administrative review hearing was precisely the stage of the proceedings where the GAGV had a right to clarify any confusion defendant may have had regarding its purposes and its functions, and it did so by providing the Board

with additional information, both at the hearing and in response to its specific requests.

Defendant's obligation to grant property tax exemptions to qualifying organizations under state law is not a "gotcha" game. If defendant was legitimately confused about the GAGV's purposes because the GAGV failed to check off two additional boxes in response to Part "a" of Question 2, he should have called, but did not, the GAGV to clarify and correct its application before making his decision. Similarly, defendant's attorney should have raised, but did not, the GAGV's "error" at the administrative hearing to give the GAGV a chance to check off the additional boxes to be consistent with its stated purposes. Having failed to give the GAGV notice of its oversight and an opportunity to correct it, defendant should not now be permitted to rely on the GAGV's "mistake" as a basis to deny it a property tax exemption.[10]

Finally, and most importantly, the New York Court of Appeals has declared that an organization's entitlement to a mandatory property tax exemption under Real Property Tax Law §420-a is not contingent upon the filing of an application on the forms prescribed by 9 NYCRR §190-1.4(c). See Kahal Bnei v. Fallsburg, 78 NY2d 194, 203-04 (1991). In so holding, the Court ruled that the religious organization in question was entitled to a property tax

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[10] Presumably, the same "estoppel" doctrine that defendant's attorney believes operated to preclude the GAGV from raising its combination of exempt purposes at the administrative hearing would likewise operate to preclude defendant's attorney from asserting her "estoppel" defense in this action because she failed to assert it at any point during the administrative appeal process.

exemption even though it did not file an application on the specified forms. If an organization's failure to fill out the specified forms does not bar its entitlement to a property tax exemption, then the GAGV's failure to check two additional boxes in response to Part "a" of Question 2 cannot bar its entitlement to a property tax exemption.[11]

VI. IF THIS COURT DETERMINES THAT THE GAGV IS ENTITLED TO A PROPERTY TAX EXEMPTION, THE GAGV IS ENTITLED TO ATTORNEYS' FEES UNDER 42 U.S.C. §1988.

Under 42 U.S.C. §1988, the prevailing party in an action brought under 42 U.S.C. §1983 to enforce the party's civil rights is entitled to reasonable attorney's fees unless special circumstances would render such an award unjust. Matter of Thomasel v. Perales, 78 NY2d 561, 567 (1991). Moreover, attorney's fees are available to the prevailing party where relief is sought on both state and federal grounds, but awarded on state grounds only. Fees may be awarded in such a case as long as the federal claim is "substantial" and arises out of a "common nucleus of operative fact" as the state claim. See Matter of Thomasel v. Perales, 78 NY2d at 568.

In light of the evidence of defendant's discrimination against the GAGV for reasons that can be ascribed only to the GAGV's

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[11] The New York Court of Appeals decided Kahal Bnei v. Fallsburg some four months before defendant filed his Answer that insists that the GAGV "had an obligation to submit to the City Assessor a properly completed exemption application, on a form prescribed by the State Board of Equalization and Assessment." Answer, ¶5.

message, the GAGV's first and fourteenth amendment claims in this action are certainly substantial. Further, the GAGV's state and federal claims all rise out of a "common nucleus of operative fact" -- defendant's denial of its application for a property tax exemption.

Thus, if the GAGV prevails in this action, this court should award it reasonable attorney's fees under 42 U.S.C. §1988.

VII. CONCLUSION

Defendant's denial of the GAGV's application for a mandatory property tax exemption under Real Property Tax Law §420-a violates the GAGV's entitlement to the exemption under the statute, as well as its rights to free speech and equal protection under law, as guaranteed by the United States and New York State Constitutions. Therefore, this court should grant the GAGV's Motion for Summary Judgment, reverse defendant's actions, and grant the GAGV's request for reasonable attorney's fees pursuant to 42 U.S.C. §1988.

Respectfully submitted,

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Dated: October 15, 1992

AFFIRMATION OF SERVICE

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On October 15, 1992, I served a copy of Plaintiff's Brief in Support of its Motion for Summary Judgment on defendant's attorneys by delivering it to them at their office at the following address:

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October 15, 1992